Supreme Court, U. S.
FILED
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IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1975

* * *

NO. 75-1635

* * *

**TALMADGE F. COMBS,**

Petitioner

V.

**THE STATE OF TEXAS,**

Respondent

* * *

# RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* * *

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# RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* * *

## OPINION BELOW

The opinion of the Court of Civil Appeals, Third Supreme Judicial District of Texas (Appendix at A-1) is reported in *Talmadge F. Combs v. State of Texas* and *Talmadge F. Combs v. Railroad Commission of Texas*, 526 S.W.2d 648 (Tex.Civ.App.-Austin 1975, writ ref'd n.r.e.). Petitioner Combs in his petition for writ of certiorari seeks a review of *Talmadge F. Combs v. State of Texas*, formerly Cause No. 12,313, and not *Talmadge F.Combs v. Railroad Commission of Texas*, formerly Cause No. 12,314. All references by Respondent to the transcript and statement of facts will be in Cause No. 12,313.

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## JURISDICTION

The formal procedural requisites of 28 U.S.C. § 1257, appear to be satisfied but Respondent denies that Petitioner's constitutional rights have been violated.

## CONSTITUTIONAL QUESTIONS PRESENTED FOR REVIEW

1. Whether the finding of the Railroad Commission of Texas that Petitioner was subject to the provisions of article 6005, V.T.C.S., as an "operator" of certain oil wells, was arbitrary, unreasonable, and discriminatory in violation of the fourteenth amendment to the United States Constitution.

2. Whether the denial to Petitioner of a right to collaterally attack a Railroad Commission of Texas order three years and three months after the order was issued was violative of Petitioner's right to due process under the United States Constitution.

## CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Petitioner purports to rely upon the fourteenth amendment to the United States Constitution. In addition, one Texas statute, article 6005, Vernon's Texas Civil Statutes Annotated (1965) (Cited herein as V.T.C.S.) is involved and is included in the Appendix at page A-9.

## STATEMENT OF THE CASE

Respondent disagrees with Petitioner's statement of the case and submits the following explanation of the nature of the case, course of proceedings and facts relevant to the issues presented on this review.

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After due notice, the Railroad Commission of Texas held a hearing on November 13, 1970, under the provisions of article 6005, V.T.C.S., pertaining to the proper plugging of the Norvell Lease Wells 1 and 3, Sour Lake Field, Hardin County, Texas.

On the basis of evidence submitted at the hearing, the Railroad Commission on August 3, 1971, issued Oil and Gas Docket No. 3-60,475, which was a Special Order requiring Talmadge Combs, as operator, to properly plug his Norvell Lease Wells 1 and 3, Sour Lake Field, Hardin County, Texas. A copy of that Special Order is attached to this brief (Appendix at A-16).

A summary of that Order is as follows:

1. After notice and hearing, the Commission found Talmadge Combs to be the operator of the two wells covered by the Special Order.
2. The wells were causing or were likely to cause pollution of fresh water above or below ground.
3. The wells had not been properly plugged.
4. Talmadge Combs was ordered to plug the wells in accordance with the rules and regulations of the Commission.
5. If the operator failed or refused to plug the wells within thirty days from the date of the Order, then the matter would be referred to the Attorney General's Office for appropriate action to secure compliance or a penalty for noncompliance with Commission rules and orders.

Special Order No. 3-60,475 does not mention "re-enter and/or re-plugging" as Petitioner alleges in his Petition for Writ of Certiorari.

On December 1, 1972, the State filed suit against Talmadge Combs to enforce the Commission's Order.

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(Tr. 3). Petitioner Combs did not file an answer in Cause No. 12,313 until November 25, 1974. (Tr. 11).

On November 21, 1974, Petitioner Combs filed *Talmadge F. Combs v. The Railroad Commission of Texas*, formerly Cause No. 12,314. This suit was an attempt to appeal from Special Order No. 3-60,475. Respondent filed a plea in abatement, special exceptions and a general denial to Petitioner's petition. The trial court sustained Respondent's pleadings and the case was dismissed. The State Court of Civil Appeals ruled that Petitioner Combs' delay of three years, three months and eighteen days from the date of the entry of the Special Order to the date of the filing of his Petition in the District Court was, as a matter of law, unreasonable. This decision is not appealed by Petitioner Combs in his Petition for Writ of Certiorari.

On December 18, 1974, Cause No. 12,313 was tried to the Court of the 53rd Judicial District of Travis County, Texas. Plaintiff's Exhibit 3, (S.F.40), sets out briefly the requirements that Petitioner should have met in plugging the wells located on the Norvell Lease, Wells 1 and 3, Sour Lake Field, Hardin County, Texas.

Requirement One was that the operator notify the Railroad Commission District Office, in writing, prior to the start of plugging operations. Petitioner testified that he never notified the District Office (S.F. 22).

Requirement Two was that plugging reports be filed within thirty days after plugging. Petitioner did not enter into evidence any plugging reports.

Requirements Three, Four and Five were that a 100-foot cement plug be installed immediately above perforations, additional cement plugs be installed at the fresh water depth as directed by the District Director and certain weight "mud" be used.

Petitioner admitted that he failed to comply with Railroad Commission Order No. 3-60,475. Petitioner testified that he had the well holes filled with pit "mud" rather than the special "mud", and had used thirteen sacks of cement in an attempt to cement only the top *sixty* feet of the well. (S.F. 24,25). Brooks Peden, a Commission witness, testified, without objection, that Petitioner had not properly complied with the Special Order No. 3-60,475. (S.F. 8, lines 7-13).

As part of the basis for this appeal, Petitioner asserts that the Texas Railroad Commission was arbitrary in finding Petitioner amenable to the provisions of article 6005, V.T.C.S. The affidavit naming Talmadge Combs as the "operator" of the wells in question stated, according to Brooks Peden, "that Talmadge Combs moved on and salvaged the salvageable material on the wells and attempted to produce them." (S.F. 15, lines 19-21). Paragraph V of Combs' verified Petition in Cause No. 12,314, stated that "the Plaintiff did not produce one drop of oil from either of the wells but pulled some 300 feet of tubing out of one and attempted to produce the other, all within about three months of time during 1970." (Plaintiff's Exhibit No. 2, S.F. 39). This was a direct admission by Petitioner Combs in his verified pleadings that he attempted to produce and salvage the properties in question.

On January 29, 1975, the 53rd Judicial District Court of Travis County, Texas, issued a mandatory injunction ordering Petitioner Combs to properly plug certain wells in compliance with a valid Railroad Commission of Texas Order.

On July 23, 1975, the Court of Civil Appeals, Third Supreme Judicial District of Texas, affirmed the judgment in Cause No. 12,313, *Combs v. State of Texas, supra.*

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On December 3, 1975, the Supreme Court of Texas refused Petitioner's Application for Writ of Error on the grounds that there was no reversible error.

## ARGUMENT AND AUTHORITIES

Petitioner has failed to cite any authority or make any necessary showing of a real and substantial Federal question essential to the jurisdiction of the United States Supreme Court over judgments of a State court. His mere averment of a Federal question or claim of constitutional right is insufficient in the absence of a showing of a real and substantial Federal question deserving of serious consideration.

Petitioner cites *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350 (1918), and *Glicker v. Michigan Liquor Control Commission*, 160 F.2d 96 (6th Cir. 1947); *Montgomery v. Suttles, Tax Collector, et al*, 135 S.E.2d (Ga.Sup. 1941); *Nebbis v. New York*, 291 U.S. 502 (1934); *Young v. Mall Inv. Co.*, 172 Minn. 428, 215 N.W. 840 (1927) and *C. B. & Q. Railway v. People of the State of Illinois ex. rel Drainage Commissioners*, 200 U.S. 561 (1906) for principles of law which no one disputes, but these cases are not appliable to the facts, issues and evidence in the present case.

It is, therefore, apparent that Petitioner Combs has failed to discharge his burden of showing why this Court should grant certiorari. None of the cases cited by Petitioner in support of his application show that his constitutional rights have been violated or that the Texas statute is unconstitutional. In fact, no decision of any court is cited which holds to the contrary of the Texas Court of Civil Appeals decision below on any issue. Petitioner has wholly failed to show that the decision in this case is not in accordance with the applicable decisions of the Supreme Court of the United States or any other court. There is no showing that the

decision of the Texas State court affects the scope of prior rulings of the U. S. Supreme Court; nor is there any showing in law or in fact of any infringement of a provision of the United States Constitution.

Petitioner's specific constitutional attacks are unclear, but Respondent understands them to be:

1. That the finding of the Railroad Commission of Texas that Petitioner was subject to the provisions of article 6005, V.T.C.S., as an "operator" of certain oil wells, was arbitrary, unreasonable and discriminatory in violation of the fourteenth amendment to the United States Constitution.
2. That the denial to Petitioner of a right to collaterally attack a Railroad Commission of Texas Order three years and three months after the Order was issued was violative of Petitioner's right to due process under the United States Constitution.

Respondent asserts that the issues posed by Petitioner and the facts of this case fail to raise a substantial Federal question.

*(1)*

*Whether Petitioner is Subject to Article 6005, V.T.C.S. is a Question of State Law and Does Not Raise a Substantial Federal Question.*

This Court long ago established the principle that it lacks the power to revise State judgments or State law. This forbearance has extended to past decisions of the Railroad Commission of Texas. See *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 310 U.S. 573 (1940).

The question of whether Petitioner was an "operator" of the abandoned wells and thus subject to

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article 6005, V.T.C.S., is only a question of the construction of State law and was properly decided on the basis of evidence considered by the Railroad Commission and consistent with appropriate legal authorities.

*(2)*

*Petitioner Was Not Denied His Rights Under The United States Constitution Because Not Permitted To Collaterally Attack the Order of the Railroad Commission of Texas Over Three Years After It Was Issued.*

It has been well established by this Court that an independent state procedural ground for judgment will suffice if the procedure serves a legitimate state purpose. In the present case, Petitioner attempted to defend against enforcement of the Railroad Commission Order by collaterally attacking the Order. This collateral attack was disallowed by the State trial court. The Texas Court of Civil Appeals upheld the trial court's decision.

Railroad Commission Special Order No. 3-60,475, was issued under the statutory authority provided by article 6005, V.T.C.S. This article is a part of the State conservation laws relating to crude petroleum oil or natural gas, and any appeal or direct attack from any action or order based on that article is governed by the appeal provisions in article 6049c, section 8, V.T.C.S. That article provides as follows:

> "Any interested person affected by the conservation laws of this State relating to crude petroleum oil or natural gas, and the waste thereof, including this Act, or by any rule, regulation or order made or promulgated by

> the Commission thereunder, and who may be dissatisfied therewith, shall have the right to file a suit in a Court of competent jurisdiction in Travis County, Texas, and not elsewhere, against the Commission, or the members thereof, as defendants, to test the validity of said laws, rules, regulations or orders. Such suit shall be advanced for trial and be determined as expeditiously as possible and no postponement thereof or continuance shall be granted except for reasons deemed imperative by the Court. In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order; and such laws, rule, regulation or order so complained of shall be deemed prima facie valid. As amended, Acts 1932, 42nd Leg., 4th C.S., p. 3, ch. 2, §8: Acts 1935, 44th Leg. p. 180, ch. 76, §14."

No appeal, as provided by article 6049c, section 8, V.T.C.S., was taken by Petitioner Combs from the Railroad Commission Order.

When the State of Texas sought to enforce Special Order No. 3-60,475, Petitioner objected on the basis that the Order incorrectly designated him as an "operator" responsible for the proper plugging of the two named wells.

Because the Special Order was regular on its face and there had been no timely appeal or direct attack, the Order was considered prima facie valid and not subject to collateral attack. Texas courts have repeatedly recognized this principle. In *Corzelius v. Harrell*, 143 Tex. 509, 186 S.W.2d 961 (1945), the Court quoted from *Magnolia Petroleum Co. v. Railroad Commission*, 218 Tex. 189, 96 S.W.2d 273, 275 (1936) as follows:

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> "This Court has respeatedly held that an order of the Railroad Commission, regular on its face, is presumed to be valid, and will be enforced unless set aside in a direct proceeding brought for that purpose; and, furthermore, it is not subject to collateral attack."

The foregoing rule was reaffirmed in *Railroad Commission v. Humble Oil & Refining Co.*, 193 S.W.2d 824, 833 (Tex.Civ.App.-Austin 1946, writ ref'd n.r.e.). In *Texas Steel Co. v. Fort Worth & D. C. Ry. Co.*, 120 Tex. 597, 40 S.W.2d 78 (1931), the Texas Court held that an order could not be collaterally attacked despite the alleged due process deficiencies and lack of Railroad Commission authority to enter the order in question, and stated on page 81:

> "It is the settled law of this state that the Railroad Commission is a quasi-judicial. (Citation omitted). Since the Railroad Commission is a quasi-judicial body, it follows that an order regular upon its face, made by the Commission, is not subject to collateral attack. (Citations omitted)."

Consistent with the above cited Texas authorities, Petitioner Combs' defense that he was not the "operator" was held by the Texas Court of Civil Appeals to be an impermissible collateral attack on Special Order No. 3-60,475, which was in all things regular and valid on its face and was never properly or timely attacked or appealed. Petitioner in his brief incorrectly attributes the Texas Court of Appeals in this case with stating that the rule against collateral attacks does not apply when evidence shows an order of the Railroad Commission to be "unreasonable or unjust". In fact, the Court below held that Petitioner's claim that the Railroad

Commission Order was unconstitutional was (1) not plead in the trial court, and (2) if plead, would have constituted an impermissible collateral attack. 526 S.W.2d at 649. This holding is in conformance with Texas law. See, e.g. *Texas Steel Co. v. Fort Worth & D. C. Ry. Co., supra.*

Petitioner also incorrectly cited *Magnolia Petroleum Co. v. Railroad Commission, supra,* and *Corzelius v. Harrell, supra,* for the proposition that a Railroad Commission Order that is regular and valid on its face will not be enforced if evidence shows it to be unreasonable and unjust. Respondent was unable to find such a proposition announced in either case. Instead, as indicated by the Court in *Magnolia Petroleum Co. v. Railroad Commission:*

> "The court has repeatedly held that an order of the Railroad Commission, regular on its face, is presumed to be valid, and will be enforced unless set aside in a direct proceeding brought for that purpose; and furthermore, it is not subject to collateral attack. *West Texas Compress & Warehouse Co. v. Panhandle & S.F. Ry. Co.* (Tex.Com.App.) 15 S.W.2d 558; *Texas Steel Co. v. Fort Worth & D. C. Ry. Co.*, 120 Tex. 597, 40 S.W.2d 78, and cases cited." 96 S.W.2d at 275.

Both cases cited by Petitioner stand for a principle different from that claimed by Petitioner and are unquestionably supportive of the refusal to allow a collateral attack on the Railroad Commission Order.

Petitioners could have challenged the Railroad Commission Order and raised the question of whether he was subject to article 6005 by appealing the Order under article 6049c, section 8, V.T.C.S. Petitioner failed

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to do so until three years, three months and eighteen days after the Order was issued. See *Combs v. Railroad Commission of Texas, supra*, at 651. Having failed to directly attack or appeal the Railroad Commission Order in a reasonable time, Petitioner was properly proscribed from collaterally attacking the Order when it was enforced.

*(3)*

*The Railroad Commission of Texas Decision Finding That Petitioner Is Subject To The Provisions of Article 6005, V.T.C.S., Is Not Violative Of The U. S. Constitution.*

Although unnecessary because Petitioner's challenge to the Railroad Commission Order was an impermissible collateral attack, Respondent submitted evidence in the State trial court to show that Petitioner Combs was an "operator" of the wells in question and subject to article 6005, V.T.C.S. Petitioner's own pleading alleged that "the Plaintiff [Petitioner] did not produce one drop of oil from either of the wells *but pulled some 300 feet of tubing out of one and attempted to produce the other*, all within about three months of time during 1970." (S.F. 39). (Emphasis added).

The term "operator" is defined in article 6005, section 2, V.T.C.S., as follows:

> ". . . operator means a person who is responsible for the physical operation and control of a well at the time the well is about to be abandoned or ceases operation."

The plain reading of article 6005, section 2, V.T.C.S., Petitioner's own pleading, and testimony at the trial clearly puts Petitioner Combs within the statutory definition of "operator".

Petitioner is mistaken when in his Petition for Writ of Certiorari, he implies that a finding that he was "operating" the wells in question means that he was producing oil from the wells. The words "operate" and "produce" are not synonymous. If Petitioner pulled tubing, ran an electrical log and attempted to produce the wells, as indicated by the pleadings and evidence in this case, he was operating the wells even though no production was obtained.

There are a number of court cases supporting this reasoning. Some of these decisions hold that "operating" is synonymous with "maintaining" the devise or enterprise in question. In the case of *Concordia-Arrow Flying Service v. City of Concordia*, 289 P. 955 (Kan. 1930), the Court explained "operate" as follows:

> "To operate an airport is to maintain it in a manner to effect accomplishment of results appropriate to the nature of the enterprise."

Cases that show "operation" to mean more than "produce" include *Horton v. Benson*, 266 S.W. 213 (Tex.Civ.App.-Gal. 1924); *Rogers v. Osburn*, 152 Tex. 540, 250 S.W.2d 296 (Tex.Civ.App.-San Antonio 1952) rev'd on other grounds, 261 S.W.2d 311 (1953); and *Saunders v. Commonwealth Casualty Co.*, 246 S.W. 613 (Mo.Ct.App. 1923).

In this case, the evidence is uncontradicted that the Petitioner attempted unsuccessfully for three (3) months to produce oil. As stated in *Concordia-Arrow Flying Service v. City of Concordia, supra*, the well was "operated" because it was being maintained "in a manner to effect accomplishment of results appropriate to the nature of the enterprise." How does one pull 300 feet of tubing out of one well and attempt to produce the

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other without being a person responsible for the physical operation and control of the wells under article 6005, V.T.C.S.

Petitioner's contention that the "record operator" is the sole party responsible for the operation and control of a well is inaccurate. Article 6005, V.T.C.S., uses the term "operator" and not "record operator." It is common for an operator to move on a lease without filing with the Railroad Commission. Petitioner Combs is an example.

The Railroad Commission Order was a reasonable enforcement of state conservation laws designed to protect the underground fresh water of Texas, to safeguard the public interest in oil and gas as natural resources; and to prevent or abate a surface nuisance resulting from the operation of land for oil and gas purposes.

W. L. Summers, Professor of Law at the University of Illinois, in his treatise "The Law of Oil and Gas" comments on the constitutionality of conservation legislation in Chapter 5, Section 106, page 174, as follows:

> "The constitutionality of legislation regulating the production, use, storage and transportation of oil and gas has been supported upon one or more of three theories. These theories are that it is within the police power of a state to enact and enforce legislation to protect the correlative rights of owners of land within a common source of supply of oil and gas, to safeguard the public interest in oil and gas as natural resouces, and to prevent or abate surface nuisances resulting from the operation of land for oil and gas purposes."

Article 6005, V.T.C.S., is a key part of the

conservation and regulatory laws of the State of Texas. A good expression of the legislative intent of article 6005, V.T.C.S. is present in Section 13 of the article which reads as follows:

> "Sec. 13. The conservation and development of all of the natural resources of this State are hereby declared a public right and duty. It is further hereby declared that the protection of waters and lands of the State against pollution or the escape of oil or gas is in the public interest. It is therefore necessary and desirable in the exercise of the police power of the State to provide additional means whereby wells which are drilled for the exploration, development or production of oil or gas, or as injection or salt water disposal wells, and which have been abandoned and are leaking salt water, oil, gas or other deleterious substances into fresh water formations or upon the surface of land, may be plugged, replugged or repaired, by or under the authority and direction of the Railroad Commission of Texas."

The Railroad Commission of Texas, in requiring Petitioner Combs to properly plug the wells in question, was carrying out the statutory mandate set out in article 6005, section 13. As stated by Professor Summers, the courts have, on many occasions, sustained the constitutionality of conservation and regulatory statutes passed to safeguard the public interest in oil and gas as natural resources, and to prevent or abate surface nuisances resulting from the operation of land for oil and gas purposes.

In the following cases, the validity of conservation statutes and regulations of conservation agencies has

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been supported against the contention that the statutes, or regulations in their operation, deprived the owner or producer of property without due process and equal protection of the law: *Ohio Oil Co. v. Indiana (No. 1)*, 177 U.S. 190 (1900); *Marrs v. City of Oxford*, 32 F.2d 134 (8th Cir. 1929), Cert. denied 280 U.S. 573 (1929); *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210 (1932); *Oxford Oil Co. v. Atlantic Oil & Producing Co.*, 16 F.2d 639 (N.D.Tex. Dallas Div. 1926), affirmed 22 F.2d 597 (5th Cir. 1927), Cert. denied 277 U.S. 585 (1928); *F. C. Henderson, Inc. v. Railroad Commission of Texas*, 56 F.2d 218 (W.D. Tex. Austin Div. 1932); *Henderson Company v. Thompson*, 300 U.S. 258 (1937); *Bandini Petroleum Co. v. Superior Court of Los Angeles County*, 284 U.S. 8 (1931), and *Brown v. Humble Oil & Refining Co.*, 126 Tex. 296, 83 S.W.2d 935 (1935).

This Court has had occasion previously to review decisions of the Railroad Commission of Texas. In *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), the issue was whether a Federal Court should entertain a suit to enjoin the enforcement of an order issued by the Railroad Commission of Texas. This Court reasoned that absention was proper in order to avoid needless conflict with the State's administration of its domestic policy. Noting that oil and gas was a very substantial resource in Texas; that the Railroad Commission of Texas had been given broad discretion in administering this resource; and that Texas had an adequate procedure for reviewing Railroad Commission orders, the Court held as follows on page 334:

> "Under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand."

This position had previously been followed by this Honorable Court in *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 310 U.S. 573 (1940), wherein this Court on pages 581-582 of its opinion stated:

> ". . . it would be presumptuous for courts, on the basis of conflicting expert testimony, to deem the view of the administrative tribunal, acting under legislative authority offensive to the Fourteenth Amendment."

Respondent asserts that the finding of the Railroad Commission of Texas that Petitioner was an "operator" under article 6005, V.T.C.S., was not arbitrary, unreasonable or discriminatroy in violation of the United States Constitution.

## CONCLUSION

Respondent asks that the Petition for Writ of Certiorari be denied because the questions raised in the petition were correctly decided by the Court of Civil Appeals, Third Supreme Judicial District of Texas, and clearly no substantial Federal question is presented in this Court.

Respectfully submitted,

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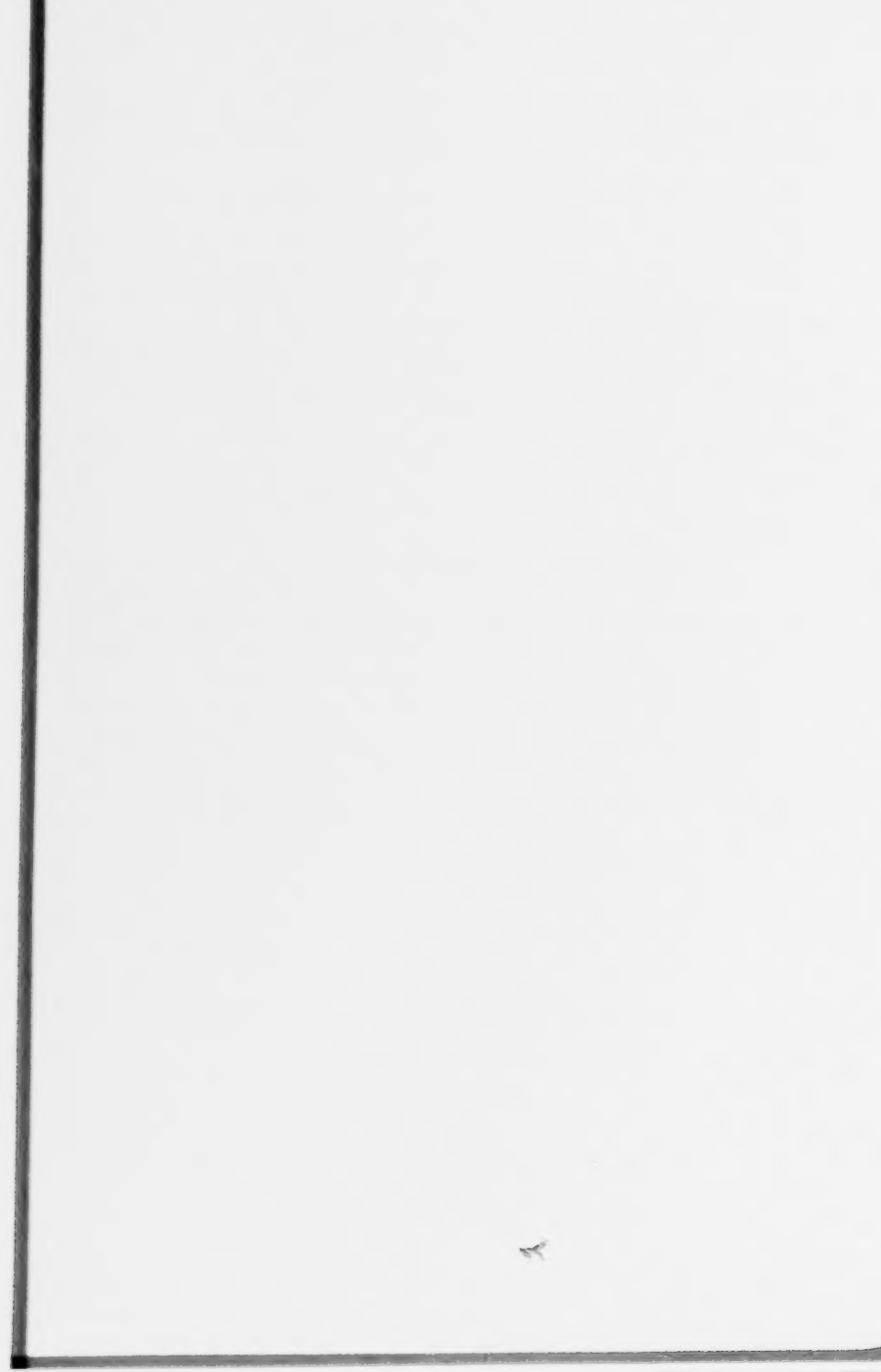
## CERTIFICATE OF SERVICE

I, Linward Shivers, Assistant Attorney General of Texas, attorney for Respondent, certify that three copies of the above and foregoing Respondent's Brief in Opposition have been served on each party separately by placing same in the United States Mail, Certified, Postage Prepaid, addressed to: Mr. Tom Burch, Attorney at Law, Sour Lake, Texas 77659 and Mr. Talmadge F. Combs, P. O. Box 5074, Beaumont, Texas 77702, on this the _____ day of May, 1976.

LINWARD SHIVERS
Assistant Attorney General

# APPENDIX



TALMADGE F. COMBS,
Appellant,
V.
THE STATE OF TEXAS,
Appellee.

TALMADGE F. COMBS,
Appellant,
V.

RAILROAD COMMISSION OF TEXAS,
Appellee.

Nos. 12313, 12314

Court of Civil Appeals of Texas, Austin.

July 23, 1975

Rehearing Denied Sept. 10, 1975.

The 126th Judicial District and 53rd Judicial District Courts, Travis County, Herman Jones, J., entered judgment ordering defendant to comply with special order requiring defendant to plug certain oil and gas wells, and dismissed defendant's suit against Railroad Commission, and defendant's appeals were consolidated. The Court of Civil Appeals, Shannon, J., held that special order would be enforced in absence of direct attack, that evidence showed defendant's noncompliance with special order, and that delay of over three years from date of entry of special order to date defendant filed attempted appeal from such order was unreasonable.

Affirmed.

1. Public Service Commissions 19(2)

Railroad Commission's special order, regular upon its face, was presumed valid and

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would be enforced in absence of direct attack.

2. Mines and Minerals 92.60

Where Railroad Commission's special order, based upon finding that defendant was operator of certain oil and gas wells, required defendant to plug such wells, was regular on its face and had not been directly attacked by defendant, contentions raised by defendant, in subsequent suit brought by state for civil penalties for defendant's alleged violation of order, that evidence was insufficient to prove that defendant was operator of wells and that evidence showed that defendant had proved substantial performance in plugging wells constituted impermissible collateral attacks on special order.

3. Mines and Minerals 92.59

Defendant, who failed to comply with Railroad Commission's special order requiring him to plug certain oil and gas wells in manner required by rule, was properly ordered to so comply.

4. Mines and Minerals 92.61

Where contentions raised were those properly made on appeal from Railroad Commission's special order in district court, suit brought against Railroad Commission was construed as attempt to appeal from Railroad Commission's special order requiring plugging of certain oil and gas wells.

5. Public Service Commissions 30

Although statute providing that any interested person who is affected by any order made by Railroad Commission and who may be dissatisfied therewith has right to file suit to test validity of such order fixes no time limit during which

dissatisfied party must file appeal, such appeal must be brought within reasonable time. Vernon's Ann.Civ.St. art. 6049c § 8.

6. Mines and Minerals 92.61

Dissatisfied party's delay of three years, three months, and 18 days from date of entry of Railroad Commission's special order requiring party to plug certain oil and gas wells, to date of filing of attempted appeal from such special order was unreasonable. Vernon's Ann.Civ.St. art.6049c, § 8.

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Thomas Burch, Sour Lake, for appellant; Talmadge F. Combs, pro se.

John L. Hill, Atty.Gen., Jerry H. Roberts, Linward Shivers, Asst. Attys. Gen.,Austin, for appellees.

SHANNON, Justice.

Upon our motion we have consolidated for purposes of appeal, cause numbers 12,313 and 12,314. Both causes will be disposed of in this opinion.

In No. 12,313, appellee, The State of Texas, sued appellant, Talmadge Combs in December of 1972, in the district court of Travis County for civil penalties for an alleged violation of a special order of the Railroad Commission of Texas. In general, the special order required appellant to plug certain oil and gas wells in Hardin County. In its suit appellee also sought an injunction requiring appellant to comply with the special order. Upon trial to the court, judgment was entered denying appellee recovery of civil penalties, but requiring the clerk to issue an injunction ordering appellant to comply with the special order. We will affirm the judgment.

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On August 3, 1971, the Railroad Commission of Texas entered Special Order No. 3-60,475. That order pertained to the plugging of the Norvell Lease Wells one and three, Sour Lake Field in Hardin County. The Commission found in that order that appellant was the "operator" of the wells within the meaning of Tex.Rev.Civ.Stat. Ann.Art 6005; that those wells were abandoned and were causing, or were likely to cause pollution of fresh water above or below the ground; and that those wells had not been properly plugged pursuant to Art. 6005. By the terms of the special order appellant was directed to plug the wells.

Appellant's first point of error is that appellee ". . . failed to produce evidence necessary to prove that the defendant [appellant] is the 'operator' as term is defined . . ." in Art. 6005.

[1,2] Special Order No. 3-60,475 named appellant as operator of the wells and ordered that he plug the wells. That order was entered in August of 1971, and appellant took no appeal. The order is regular on its face, is presumed valid, and will be enforced in the absence of a direct attack. *Magnolia Petroleum Co. v. Railroad Commission*, 128 Tex. 189, 96 S.W.2d 273 (1936), *Corzelius v. Harrell*, 143 Tex. 509, 186 S.W.2d 961 (Tex.1945). Appellant's first point of error is overruled.

Appellant's second point is that the court erred in entering judgment for appellee because the evidence ". . . clearly proved SUBSTANTIAL PERFORMANCE on the part of the defendant [appellant] in plugging the wells to remove a condition for which the defendant [appellant] was not responsible for creating in the first place and to order defendant [appellant] to make forced expenditures for a condition which he did not create is to deny him due process and equal

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protection guarantedd [sic] to defendant under the Constitution of the State of Texas."

That part of point of error two claiming a violation of appellant's constitutional rights was not pleaded. Had that violation been pleaded, it, like the first point of error, would have constituted an impermissible collateral attack on Special Order No. 3-60,475.

[3] We are satisfied that the statement of facts shows that appellant had notcomplied with the special order, and that the district court properly ordered appellant to so comply. Statewide Rules 14(c)(1-a), 14(c)(1-e) and 14(c)(1-g) of the Commission require the placement of a one-hundred-foot concrete plug immediately above perforations and additional cement plugs as requested by the district director at the fresh water depth, and the use of mud of a certain weight. Appellant's testimony showed a noncompliance. Appellant testified that he had caused the wells to be filled with pit mud and that thirteen sacks of cement were then used to cement the upper sixty feet of the wells. Brooks Peden, an employee of the Commission, was permitted to testify without objection that from an examination of the records of the Commission he had made a determination that appellant had not complied with the special order.

The remaining portion of this opinion concerns cause number 12,314. On November 21, 1974, appellant, Talmadge Combs, filed suit against appellee, Railroad Commission of Texas, in the district court of Travis County. In response, the Commission filed a number of special exceptions and "pleas in abatement" and a general denial. Upon hearing, the district court entered an order in which the cause was ". . . dismissed from the docket of this Court . . ."

The language of appellant's trial pleading

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is neither very clear nor precise. In those pleadings appellant referred to the Commission's special order of August 3, 1971, (No. 3-60,475) by the terms of which he was ordered to plug the Norvell Lease Wells one and three. Appellant pleaded that he did plug the wells and that he furnished the Commission with the required reports. Appellant's pleading then referred to the investigation of the Commission to ascertain whether or not the wells had been properly plugged, and to the intra-agency determination that appellant had not complied with the special order. Appellant's pleadings made further reference to the fact that at his request he was invited to a conference with Brooks Peden, an employee of the Commission, and others, concerning whether or not he had complied with the special order. Appellant described that meeting as a "hearing" and contended that it was invalid because it was ". . . not held before the Commission sitting as a body . . ." As a result of that meeting, appellant received a letter dated March 5, 1974, presumably from Peden, in which was detailed the position of the Commission with respect to what appellant had to do to comply with the special order. Appellant's pleading characterized that instrument as an "executive order." Some claim is made by appellant that his suit was an appeal to the district court from the so-called executive order.

In further paragraphs, appellant averred that he ". . . cannot be the LEGAL OPERATOR of the wells so as to give the defendant [the Commission] jurisdiction over him," and, thereafter, he alleged facts to support that contention.

Among other things, the Commission specially excepted to appellant's pleading as a whole upon the basis that it failed to state a cause of action. The basis for the special exception was that appellant's pleading showed on its face that it was an attempt to appeal from the

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special order entered by the Commission on August 3, 1971, and that the petition filed on November 21, 1974, was, as a matter of law, not timely filed.

[4] We have experienced some difficulty in determining the exact nature of appellant's claim. We have concluded that appellant's basic complaint is that, for many reasons, the Commission should not have determined that he was an "operator" under Art. 6005, and for the Commission ". . . to single him out to remove a condition [plug the wells] for which he is in no way responsible for [sic] violates due process and equal rights of the plaintiff gauranteed [sic] to him under the Constitution." Appellant's contentions are those properly made in an appeal of the special order to the district court. Accordingly, we construe appellant's suit to be an attempt to appeal from the special order.

[5,6] Tex.Rev.Civ.Stat.Ann. Art. 6049c § 8 provides in part: "Any interested person affected by . . . any . . . order made . . . by the Commission . . . and who may be dissatisfied therewith, shall have the right to file a suit in . . . Travis County . . . to test the validity of said . . . orders." Though the statute fixes no time limit during which the dissatisfied party must file this appeal, such appeal must be brought within a reasonable time. *Midas Oil Co. v. Stanolind Oil and Gas Co.*, 142 Tex. 417, 179 S.W.2d 243 (1944), *Board of Water Engineers v. Colorado River M. W. Dist.*, 152 Tex. 77, 254 S.W.2d 369 (1953); see *Railroad Commission of Texas v. Aluminum Company of America*, 380 S.W.2d 599 (Tex.1964). Appellant's delay of three years, three months, and eighteen days from the date of the entry of the special order to the date of the filing of his petition in district court is, as a matter of law, unreasonable. *Board of Water Engineers v. Colorado River M. W. Dist., supra.*

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The judgments in both cause numbers 12,313 and 12,314 are affirmed.

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Article 6005, V.T.C.S., plugging Abandoned Wells.

Definitions

"Section 1. In this Article, unless the context requires a different definition,

(1) "well" means a hole drilled for the purpose of:

(a) producing oil or gas; or
(b) injecting any fluid or gas into the ground in connection with the exploration or production of oil or gas; or
(c) obtaining geological information by taking cores or through seismic operations;

(2) "operator" means a person who is responsible for the physical operation and control of a well at the time the well is about to be abandoned or ceases operation;

(3) "nonoperator" means a person who owns a working interest in a well at the time the well is about to be abandoned or ceases operation and is not an "operator" as defined in this Article do not mean a royalty interest owner or an overriding royalty interest owner;

(4) "landowner" means the owner of the land upon which the well is situated at the time the well is abandoned and one who holds a mineral interest therein;

(5) "person" means any natural person, corporation, association, partnership, receiver, trustee, guardian, executor and fiduciary or representatives of any kind;

(6) "Commission" means the Railroad Commission of Texas.

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Duty of operator

"Sec. 2. The operator of a well shall properly plug the well when required and in accordance with the Commission's rules and regulations which are in effect at the time of plugging.

Duty of nonoperator

"Sec. 3. If the operator of a well fails to comply with Section 2 of this Article, then each nonoperator is responsible for his proportionate share of the cost of the proper plugging of the well within a reasonable time, according to the rules and regulations of the Commission in effect at the time the responsibility attaches.

Duty of landowner

"Sec. 4. If the operator fails to comply with Section 2 of this Article and the nonoperator fails to comply with Section 3 of this Article, then, in that event each landowner is responsible for his proportionate share of the cost of proper plugging of the well within a reasonable time, according to the rules and regulations of the Commission in effect at the time the responsibility attaches.

Cause of action

"Sec. 5. If a landowner plugs or replugs a well under Section 4 of this Article then the landowner shall have a cause of action against the operator and nonoperator or either of them, as the case may be, in any court of competent jurisdiction for all reasonable costs and expenses incurred in the plugging or replugging of the well, to be secured by a lien upon the interest of the operator and the nonoperator, or either of them as the case may be, in the oil and gas underlying the lease upon which

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the well is located and upon the interest of the operator and the nonoperator, or either of them, as the case may be, in all fixtures, machinery and equipment found or used on said lease; provided, however, that if the landowner is responsible for the well not being properly plugged, then the said landowner shall not have a cause of action under this Article.

Recovery against others

"Sec. 6. If an operator, nonoperator or landowner owns only a partial interest in the well, oil and gas or land, as the case may be, and said operator, nonoperator or landowner pays a larger proportion of the cost of plugging the well than his proportionate interest in the well, oil and gas or land, as the case may be, then he shall have cause of action against the other operators, nonoperators or landowners, as the case may be, for their proportionate shares of the cost of plugging.

Duty of commission

"Sec. 7. (a) If it comes to the Commission's attention that a well which has been abandoned or is not being operated is causing or is likely to cause pollution of fresh water above or below the ground or if gas or oil is escaping from said well, the Commission, after due notice, at a hearing, shall determine whether or not the well was properly plugged under Section 2, Section 3 or Section 4 of this Article.

(b) If the Commission finds that the well was not properly plugged, it shall order the operator to plug the well according to the rules and regulations of the Commission in effect at the time the order is issued. If the operator cannot be found or is no longer in existence, or if the operator has no assets with which to properly

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plug the well, the Commission shall order the nonoperators to plug the well according to the rules and regulations of the Commission in effect at the time the order is issued. If the nonoperators cannot be found or are no longer in existence, or if the nonoperators have no assets with which to properly plug the well, the Commission shall order the landowners to properly plug the well according to the rules and regulations of the Commission in effect at the time the order is issued.

Power of the commission

"Sec. 8. (a) Upon the determination by the Commission under Section 7(a) of this Article that such a well has not been properly plugged, or needs replugging, the Commission, through its employees or through a person acting as agent for the Commission, may plug or replug such a well, if

(1) the well was properly plugged according to regulations in effect at the time the well was abandoned or ceased to be operated; or

(2) neither the operator, nonoperator nor the landowner properly plugged the well, and

(A) neither the operator, nonoperator nor the landowner can be found; or

(B) neither the operator, nonoperator nor the landowner has assets with which to properly plug the well.

(b) The Commission, its employees, or its agents, or the operator, or the nonoperator, or the landowner may enter the land of another for the purpose of plugging or replugging the well which the Commission has determined, under the provisions of Section 7(a), has not been properly plugged. The Commission, its employees, its

agents, the operator, nonoperator and the landowner shall not be liable for any damages which may occur as a result of acts done or omitted to be done by them or each of them in a good faith effort to carry out the provisions of this Article.

Cause of action of state

"Sec. 9. If the Commission plugs a well under Section 8 of the Article, the State has a cause of action for all reasonable expenses incurred in plugging or replugging the well according to the rules and regulations of the Commission in effect at the time the well is plugged or replugged. The cause of action is first against the operator, to be secured by a lien upon his interest in the oil and gas in the land and all his fixtures, machinery and equipment found or used on the land where the well is situated, and second, against the nonoperator at the time the well should have been plugged, to be secured by a lien upon his interest in the oil or gas in the land, and third, against the landowner, to be secured by a lien upon his interest in the land.

Accepting money from private persons

"Sec. 10. The Commission may accept money from private persons and use the money to plug or replug any well. Paying money to the Commission is not an admission that the person paying the money is obligated to plug or replug the well. Evidence that a person has paid money to the Commission is not admissible against the person in any suit in which the person's obligation to plug a well is an issue, and introducing the evidence is a compulsory ground for mistrial.

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Commission enforcement

"Sec. 11. In addition to the powers specifically granted to the the Commission under the provisions of this Article, the Commission may enforce the provisions of this Article or any rule, regulation or order of the Commission promulgated hereunder, in the same manner and upon the same conditions as provided for in Title 102 of the Revised Civil Statutes of Texas, 1925.

Appeals to courts

"Section 12. Any person affected hereby may sue to test the validity of any rule, regulation or order promulgated by the Commission under this Article in the same manner, upon the same conditions and to the same court or courts, as prescribed for suits testing the validity of rules, regulations and orders of the Commission promulgated under the general oil conservation statutes of this State.

Protection of waters against pollution

"Sec. 13. The conservation and development of all of the natural resources of this State are hereby declared a public right and duty. It is further hereby declared that the protection of waters and lands of the State against pollution or the escape of oil or gas is in the public interest. It is therefore necessary and desirable in the exercise of the police power of the State to provide additional means whereby wells which are drilled for the exploration, development or production of oil or gas, or as injection or salt water disposal wells, and which have been abandoned and are leaking salt water, oil, gas or other deleterious substances into fresh water formations or upon the surface of the land, may be plugged, replugged or repaired, by or under the authority and direction of the

Railroad Commission of Texas." As amended Acts 1965, 59th Leg., p. 762, ch. 355, § 1.

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RAILROAD COMMISSION OF TEXAS
OIL AND GAS DIVISION

OIL AND GAS DOCKET NO. 3-60,475

IN RE: CONSERVATION AND PREVENTION OF WASTE OF CRUDE PETROLEUM AND NATURAL GAS IN THE SOUR LAKE FIELD, HARDIN COUNTY, TEXAS

Austin, Texas

August 3, ,1971

SPECIAL ORDER
REQUIRING TALMADGE COMBS TO PROPERLY PLUG
HIS NORVELL LEASE WELLS 1 & 3
SOUR LAKE FIELD
HARDIN COUNTY, TEXAS

WHEREAS, After due notice, the Railroad Commission of Texas held a hearing on November 13, 1970, under the provisions of Article 6005, Revised Civil Statutes of Texas, 1925, as amended, pertaining to the proper plugging of the Norvell Lease Wells 1 & 3, Sour Lake Field, Hardin County, Texas; and

WHEREAS, From the evidence adduced at said hearing, from the records and reports available to the Commission, and from Commission files, it appears to the Commission and the Commission finds: That Talmadge Combs is the "operator" of said wells as defined by said Article 6005; that said wells have been abandoned or are not being operated and are causing or are likely to cause pollution of fresh water above or below the ground; that said wells have not been properly plugged under Section 2, Section 3, or Section

4 of said Article 6005.

NOW, THEREFORE, IT IS ORDERED By the Railroad Commission of Texas that Talmadge Combs be and he is hereby ordered to plug in accordance with the rules and regulations of the Commission those certain wells drilled for the purpose of producing oil and gas and identified on Commission records as "Norvell Lease Wells 1 & 3, Sour Lake Field, Hardin County, Texas."

IT IS FURTHER ORDERED That if the operator herein fails or refuses to plug said wells in accordance with the terms of this order within thirty days from the date hereof, that this file be referred to the Attorney General for appropriate action to secure compliance or penalty for non-compliance with Commission rules and orders.

IT IS FURTHER ORDERED That this cause be held open on the docket for such other and further orders as may be necessary.

RAILROAD COMMISSION OF TEXAS

s/ Byron Tunnell
Chairman

s/ J. C. Langdon
Commissioner

Commissioner

ATTEST:

s/ George F. Singletary, Jr.
Secretary

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